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December 9, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: July 14, 2004

Case No.: TIA-0138

XXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in obtaining state workers' compensation benefits. An independent physician panel (the Physician Panel or the Panel) issued a positive determination on two illnesses and a negative determination on the remaining illnesses. The Applicant appealed the negative determination, and we remanded the application for further consideration. See Worker Appeal, Case No. TIA-0039, 28 DOE & 80,327 (2003). The Panel issued a second negative determination, and the Applicant filed the instant appeal. As explained below, we have determined that the Appeal should be granted and the application given further consideration.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this

program, and its web site provides extensive information concerning the program.^{1/}

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. ' 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act - Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. OHA continues to process appeals until DOL commences Subpart E administration.

B. Procedural History

The Applicant filed an application for physician panel review, in which he claimed that he had a number of illnesses that were related to exposure to toxic substances during his employment at a DOE facility. The Applicant worked at a DOE facility from 1963 to 1988 and from 1992 until relatively recently. From 1963 to 1980, the Applicant worked as a technical specialist in a metallurgy department, and it is this period that is the primary focus of his application. The Applicant claimed the following illnesses: nephrosis, prostate cancer, peripheral neuropathy, bone pain, osteomalacia, hypothyroidism, and chronic lung disease. The Applicant submitted voluminous information on his exposures and his illnesses. The information included (i) a February 2001 report by a pulmonologist at the National Jewish Medical Center, who referred the Applicant to a toxicologist, (ii) a handwritten letter from his supervisor (the Supervisor) to a toxicologist, attaching a list of the substances and processes involved in their work, (iii) a May 2001 report by the toxicologist, who concluded that the Applicant's illnesses were related to exposure to cadmium and solvents, and (iv) a May 2002

^{1/} See www.eh.doe.gov/advocacy.

letter from the DOE contractor who employed the Applicant (the DOE Contractor), confirming that the Supervisor's letter accurately described the Applicant's work.

The OWA referred all seven illnesses to the Physician Panel, and the Panel issued the first determination in this case. The Physician Panel rendered a positive determination on two illnesses - nephrosis and prostate cancer. The Panel found that those illnesses were related to the Applicant's exposure to cadmium. The Physician Panel rendered a negative determination on the remaining illnesses. The Panel stated that A[t]here is no convincing objective evidence that the other conditions claimed are related to [the worker's] employment.@ Report at 1.

The OWA accepted the determinations, and the Applicant appealed. We granted the appeal. See Worker Appeal, Case No. TIA-0039, 28 DOE & 80,327 (2003). We found that the Panel's explanation on the remaining illnesses reflected an overly stringent standard of proof and lacked sufficient detail. Accordingly, we remanded the application for further consideration. We noted that the Applicant was particularly interested in a positive determination on two illnesses - bone pain and peripheral neuropathy - and indicated that he had the option of eliminating the other illnesses from further consideration.

In response to the remand, the Panel issued a new determination (the Determination). The Panel stated that, pursuant to the Applicant's direction, the Panel limited its review to bone pain and peripheral neuropathy. The Panel determined that those illnesses were not related to exposures to a toxic substance at DOE.

First, the Panel discussed the Applicant's exposures. The Panel devoted most of its discussion to the Applicant's work during the 1963 to 1980 period, which everyone agrees is the period of greatest exposure. The Panel viewed those exposures as insignificant.

Second, the Panel addressed the Applicant's bone pain. The Panel stated that occupational causes of bone pain include cadmium, lead, or fluoride exposure. Although the Panel had previously found that the Applicant's prostate cancer and nephrosis were related to cadmium exposure, the Panel rejected cadmium exposure as a cause of his bone pain, citing the nature and timing of his condition. The Panel eliminated lead and

fluoride exposure as factors, stating that the Applicant does not appear to have had significant exposure to those substances. Determination at 2.

Third, the Panel addressed the Applicant's peripheral neuropathy. The Panel stated that occupational causes of peripheral neuropathy include solvents, lead, acrylamide, arsenic, thallium, mercury, and methyl bromide. The Panel stated that while the Applicant may have been exposed to various neurotoxins such as solvents and lead, no industrial hygiene information is available on his exposures. Report at 2. In any event, the Panel rejected solvents as a cause, citing the nature and timing of his neuropathy.

The Panel's finding with respect to the timing of his illnesses was the same for bone pain and peripheral neuropathy. The Panel stated that the Applicant did not have the conditions until the 1990's, well after the period of maximum exposure to toxic substances.

The Applicant appeals from the Determination. His arguments are discussed below.

II. Analysis

A. Applicable Standards

The Physician Panel Rule set forth the standard for the Panel to use in making its determination. The standard was whether it is at least as likely as not that exposure to a toxic substance during employment at a DOE facility was a significant factor in aggravating, contributing to or causing the illness. 10 C.F.R. § 852.8. The Rule required that the panel explain the basis of its determination. 10 C.F.R. § 852.12(b)(5). The preamble to the Rule stated that, although an applicant bore primary responsibility for submitting sufficient information to support the application, DOE would assist applicants as it was able. 67 Fed. Reg. 52841, 52844 (2002).

B. The Applicant's Exposures

The Applicant maintains that the Panel understated his exposures. As explained below, we have concluded that the Panel failed to provide an adequate explanation of why it viewed the exposures as insignificant.

The Panel cited the Supervisor's letter, but the Panel did not cite the letter's list of toxic substances and processes. Instead, the Panel quoted the letter's discussion of protective measures, implicitly finding that the protective measures precluded significant exposure.

The implicit finding that protective measures resulted in insignificant exposure is difficult to reconcile with the record. The finding is inconsistent with the purpose of the Supervisor's letter and the May 2002 DOE Contractor's letter, which were written to support the Applicant's claim of occupational illness. Moreover, the Panel inaccurately quoted the Supervisor's discussion of protective measures, and the inaccuracy was significant. When the Supervisor discussed the protective measures for known toxic substances, as opposed to non-hazardous substances, he used quotation marks around the word "known" and the word "non-hazardous." The Supervisor's use of quotation marks indicates that substances deemed non-hazardous at the time - 20 to 40 years go - may now be recognized as toxic. The Panel omitted those quotation marks from the excerpted portion of the letter and, therefore, this meaning was lost. In addition to misreading the Supervisor's letter, the Panel did not discuss or refer to what we believe to be an important part of the DOE Contractor's letter, which referred to the Applicant's "intimate involvement" with the substances and work identified in the Supervisor's letter.^{2/} Finally, the

^{2/} The DOE Contractor's letter provides in relevant part:

A team of Records, Declassification, Legal and Human Resources staff . . . has reviewed both classified and non-classified materials including publications, photographs, invention reports and laboratory record books which document the materials and operations [the Applicant] was involved with . . . during the 1963 to 1980 period. In addition, the team interviewed [the Supervisor], the Senior Scientist who was the Project Manager for this vital National Security work. [The Supervisor] has provided a letter detailing and confirming the substances and processes [the Applicant] was involved with on this program. The nature of the operations/processes was quite varied and included brazing, spot welding, vapor degreasing, bead blasting, electro-polishing for equipment fabrication, assembly, disassembly and product testing
(continued ...)

implicit finding that protective measures resulted in insignificant exposure seems inconsistent with the Panel's determination that the Applicant's nephrosis and prostate cancer resulted from cadmium exposure.

The degree of exposure is significant because the Supervisor's letter identifies substances that the Panel cited as potential causes of bone pain and peripheral neuropathy. The Panel identified cadmium, lead, or fluoride exposure as possible causes of bone pain, and it identified solvents, lead, acrylamide, arsenic, thallium, mercury, and methyl bromide as possible causes of peripheral neuropathy. The Supervisor's letter includes some of those substances, namely cadmium, lead, solvents, and mercury.

As the foregoing indicates, the Panel has not adequately explained the basis for its determination that the Applicant's exposures were insignificant. Accordingly, the application should receive further consideration.

Further consideration of this application should include material submitted in conjunction with the appeal. The appeal file contains two more letters from the Supervisor. These letters will be referred to as the Supervisor's second and third letters.

(... continued)

The substances used in this research program included radioactive materials, toxic solvents and heavy metals including cadmium.

Due to the nature of this program, [the Applicant] was exposed to many hazardous substances. ...

A review of the attached documents supports and verifies [the Applicant's] ... claim concerning the job responsibilities of his position [A classification officer] conducted an intensive search of classified materials and cannot provide details on the classified work, except to say that there is nothing in the record that would diminish in any way his intimate involvement with the work and the materials identified in the unclassified documents.

May 2, 2002 letter at 1.

The Supervisor's second letter, again addressed to the toxicologist, is an undated, typed, follow-up letter to the first and concerns the difficulties the Applicant was experiencing in his workers' compensation claim. The Supervisor states that the Applicant informed him that one of the examiners questioned the validity of the large number of substances used by our team. The Supervisor states that it came as a surprise that his first letter and the DOE contractor's May 2002 supportive letter were not a sufficient explanation of the Applicant's exposures. The Supervisor goes on to provide a list of substances with a new column that states how they were used, as well as a list of various articles, papers, and reports that discuss the work. The Supervisor states that he identified the portions of those documents that showed how an individual could be exposed to the substances in question.

The Supervisor's third letter, dated July 12, 2004, is addressed to this office and supports the instant appeal. The Supervisor states that the Panel drew the wrong conclusions from his first letter. The Supervisor attributes the wrong conclusions to the Panel's lack of information about the building where they worked and the research they were doing. The Supervisor states that the building's complex ventilation system did not make it easy to ventilate some of the smaller rooms including two of the roughly 8 by 12 foot rooms that the Applicant used for torch brazing and metal fabrication. The Supervisor states that the Applicant participated in experiments to study metallic arcs in gas discharges using lead cathodes and that lead exposure came from skin contact and dust inhaled from mechanical operations to remove flux and excess solder. Supervisor's third letter at 3. The Supervisor describes the Applicant's work with fluorides, referring to fumes and skin exposure high enough to turn the skin white. Id. The Supervisor provides further relevant information, which need not be detailed here but should be reviewed in a further consideration of this case. Consideration of the Supervisor's letter should take into account the difficulty of documenting exposures associated with classified work.

C. The Timing of the Applicant's Bone Pain and Peripheral Neuropathy

The Applicant maintains that the Panel erred when it stated that he did not experience bone pain and peripheral neuropathy until well after the 1963 to 1980 period of maximum potential exposure. The Applicant states that he had the two illnesses in

the 1970s and that he reported them in medical examinations with site doctors and with his private physicians. He recognizes that the reports of site examinations do not include these reports, and he states that he has attempted, but been unable, to locate his private medical records for that period.

The record reviewed by the Panel contained little information on the timing of the Applicant's illnesses. The contemporaneous notes of site physicians during the 1963 to 1980 period do not mention bone pain or peripheral neuropathy. On the other hand, a February 2001 pulmonologist's report refers to the Applicant's report that his symptoms began in the 1963 to 1980 period.

The appeal contains additional information concerning the timing of the Applicant's illnesses. The Supervisor's third letter states that the Applicant's physical problems were present and increased in intensity and frequency during the 1963 to 1990 time period.

As mentioned above, in general, we review Panel determinations based on the record presented to the Panel. Since the Panel did not have the benefit of the Supervisor's third letter, the Panel cannot be faulted for failing to consider it. The letter is significant new information that should be considered along with the issue of the Applicant's exposures.

III. Summary and Conclusion

The application should be given further consideration based on the record, augmented by the Supervisor's second and third letters. Further consideration should be given to the evidence of the Applicant's exposures, the difficulty of documenting his exposures given the classified nature of his work, and the evidence that his illnesses began during the time of those exposures. The Applicant may wish to submit the attachments to the Supervisor's second letter for inclusion in this consideration.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0138 be, and hereby is, granted as set forth in paragraph 2 below.
- (2) The Physician's Panel Report failed to explain adequately the basis of its determination and the Applicant has

submitted significant new information relevant to his application. Reconsideration is in order.

- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: December 9, 2004